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IN THE
COURT OF APPEALS OF INDIANA

FELIX HERNANDEZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A05-0705-CR-285
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George Biddlecome, Judge
Cause No. 20D03-0409-FA-150

APRIL 3, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Defendant-Appellant Felix Hernandez appeals his conviction of dealing in methamphetamine, a Class A felony. We affirm.

Hernandez raises four issues for our review, which we restate as:

I. Whether the trial court erred in sentencing Hernandez for "dealing in cocaine or narcotic" when the offense was "dealing in methamphetamine."

II. Whether the trial court abused its discretion by giving a final instruction that impermissibly shifted the burden of proof.

III. Whether there is sufficient evidence to support Hernandez's conviction.

IV. Whether the trial court abused its discretion in admitting certain evidence.

On September 8, 2004, Elkhart Police Officer Scott Claybaugh observed a Cadillac make a right hand turn without a signal. Because Officer Claybaugh was not in uniform or in a marked car, he contacted Officer Doug Ryback who was also in the area. Officer Ryback stopped the vehicle while Officer Claybaugh watched from two blocks away.

As Officer Ryback approached the Cadillac, which was driven by Hernandez, he observed Hernandez hand a package to the front-seat passenger. This passenger was later identified as Rebecca Laracuente, Hernandez's wife. Officer Ryback asked Hernandez for his license, registration, and proof of insurance; however, Hernandez was unable to provide the proof of insurance.

A few minutes later, while Officer Ryback was still reviewing Hernandez's information, a canine officer arrived and walked his dog around the Cadillac. The dog

"indicated on the passenger-side of the vehicle." (Tr. at 45). At that time, Laracuente appeared nervous and was trembling uncontrollably with her eyes straight ahead and her stomach "going in and out really fast as if she was breathing really fast." (Tr. at 46-47). Officer Ryback asked Laracuente to exit the Cadillac and observed a "white, crystal-like substance" on Laracuente's lap, on the passenger seat, and on the Cadillac's console. (Tr. at 46). After Laracuente exited the Cadillac, she brushed some of the white substance off of her lap. Laracuente was searched and additional white substance fell out of her brassiere. The officers recovered the package passed from Hernandez to Laracuente. The package contained eighty-five grams of methamphetamine, worth approximately $8,500 on the local market.

Hernandez was charged with dealing in methamphetamine. He twice moved to suppress the evidence, and the trial court denied the motions on both occasions. A jury found Hernandez guilty, and he was subsequently given a thirty-year sentence.

I.

Hernandez contends that the trial court erred in sentencing him for the offense of dealing in cocaine or narcotic drug, a Class A felony, when his conviction was for dealing in methamphetamine, a Class A felony. We note that at the time Hernandez committed his offense, the dealing of methamphetamine was proscribed by Ind. Code § 35-48-4-1, which was entitled "Dealing in cocaine or narcotic drug." By the time Hernandez was sentenced in December of 2006, the Indiana Legislature had deleted methamphetamine from Ind. Code § 35-48-4-1 and had created a separate offense of dealing in methamphetamine pursuant to Ind. Code § 35-48-4-1.1. This new statute

applied "only to crimes committed after June 30, 2006." *See* P.L. 151-2006, Sec. 22. Thus, although the title of Ind. Code § 35-48-4-1 was somewhat confusing, it was the statute that applied at the time of Hernandez's sentencing. Therefore, the trial court did not err in sentencing Hernandez under the older statute.

II.

Hernandez contends that the trial court instructed the jury in a manner that impermissibly shifted the burden of proof through mandatory presumptions in favor of the State. Hernandez cites *Sandstrom v. Montana*, 442 U.S. 510, 515, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), in which the court held that the jury could have interpreted an instruction stating that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" as a mandatory presumption. The court also held that an instruction that uses mandatory presumptions improperly shifts the burden of proof on the issue of intent and violates the Due Process Clause by not requiring the State to prove every element of the crime charged. *Id*. The court further held that this type of instruction denies the defendant due process in cases where intent is at issue because it fails to explain that the presumption can be rebutted by the defendant coming forth with evidence to the contrary. *Id*. at 517-18.

The instruction at issue reads as follows:

> You may infer that everyone is presumed to intend the natural and probable consequences of his voluntary acts, unless the circumstances are such as to indicate the absence of such intent. A determination of the Defendant's intent may be arrived at by a jury from consideration of the Defendant's conduct and the natural and usual sequence to which such conduct logically and reasonably points.

> When an unlawful act, however, is proved to be done knowingly, no further proof is needed on the part of the State in the absence of justifying or excusing facts, since the law presumes a criminal intent from an unlawful act knowingly done.

(Supplemental App. at 14).

Subsequent to the United States Supreme Court's holding in *Sandstrom*, our supreme court decided *Jacks v. State*, 271 Ind. 611, 394 N.E.2d 166 (1979). In *Jacks*, the instruction under consideration stated, "everyone is presumed to intend the natural and probable consequences of his voluntary acts, unless the circumstances are such to indicate the absence of such intent." *Id*. at 174. The *Jacks* court distinguished the instruction from the one in *Sandstrom*, holding that the instruction had neither the conclusive nor burden-shifting effect of the *Sandstrom* instruction because the presumption was qualified by informing the jurors that they could look to the surrounding circumstances. *Id*. at 175. The *Jacks* court did, however, note that a proper instruction should state that the jury may infer intent from certain proven acts of the defendant rather than that the law presumes intent. *Id*. at 175-76.

In *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), the Court again determined that instructions were constitutionally deficient because they established a mandatory presumption. The instructions stated, "the acts of a person of sound mind and discretion are presumed to be the product of a person's will" and "a person is presumed to intend the natural and probable consequences of his acts." *Id*. at 316. The Court noted that the challenged portion of an instruction "must be considered in

the context of the charge as a whole." *Id*. at 315. However, the Court held that the instructions at issue were not cured by subsequent language that the presumption may be rebutted. *Id*. at 316.

Subsequently, in *Winegeart v. State*, 665 N.E.2d 893, 903 (Ind. 1996), our supreme court considered the following instruction:

> You are instructed that where a specific intent or kind of culpability is required to make an act an offense, such as in the charge preferred [sic] against the defendant, the State is not required to make proof of specific intent by direct evidence, since purpose and intent are subjective facts. That is, they exist within the mind of man, and since you cannot delve into a person's mind and determine his purpose and intent, you may look to all the surrounding circumstances, including what was said and done in relation thereto. The State is only required to produce such evidence as will satisfy the jury beyond a reasonable doubt that the crime charged was committed by the defendant with the degree of culpability charged in the information. You may, however, infer that every person intends the natural and probable consequences of his voluntary acts, unless the circumstances are such to indicate the absence of such intent. A determination of the defendant's intent may be arrived at by the jury from a consideration of the defendant's conduct and the natural and usual consequences to which such conduct logically and reasonably points.
>
> Where an unlawful act, however, is proved to be knowingly done, no further proof is needed on the part of the State in the absence of justifying or excusing facts.

The court concluded that the instruction was not improper under either *Sandstrom* or *Francis* because it talked "in terms of what the jury 'may look to,' 'may infer,' and may consider in order to arrive at 'a determination of the defendant's intent.'" *Id*. at 904. Thus, the court held, "Overall, [the instruction] did not mandate that the jury employ any

particular presumptions but merely permitted it to draw appropriate inferences from the evidence." *Id*.

In the first paragraph, the instruction at issue in this case also talks in terms of what the jury "may infer" and how a determination of the defendant's intent "may be arrived at." (Supplemental App. at 14). The second paragraph essentially duplicates the instruction approved by our supreme court in *Winegeart.* Accordingly, the instruction did not have the prohibited mandatory effect.[1]

III.

Hernandez contends that the State failed to show that he knew the package he passed to Laracuente contained methamphetamine. Thus, he argues that the State failed to prove that he "knowingly" delivered methamphetamine.

When reviewing the sufficiency of evidence to support a conviction, an appellate court considers only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State,* 867 N.E.2d 144, 146 (Ind. 2007). Courts of review must be careful not to impinge on the fact-finder's authority to assess witness credibility and to weigh the evidence. *Id*. We will affirm the conviction unless "'no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.'" *Id*. (quoting *Jenkins v. State*, 726 N.E.2d 268, 270 (Ind. 2000)).

[1] Because of the permissive language used in the instruction, this case is distinguishable from *Lampkins v. State*, 749 N.E.2d 83 (Ind. Ct. App. 2001), *trans. denied,* and *Matthews v. State*, 718 N.E.2d 807 (Ind. Ct. App. 1999).

In Indiana, knowledge of the nature of the substance delivered or sold is an element of dealing in a controlled substance. *Bemis v. State*, 652 N.E.2d 89, 92 (Ind. Ct. App. 1995). Knowledge can be inferred from circumstances of possession. *Id*.

The State presented evidence that upon being stopped by Officer Ryback Hernandez handed a package to his passenger, Laracuente. Officer Ryback subsequently observed remnants of the contents of the package--a white, rocklike substance--on the Cadillac's console, the passenger seat, and Laracuente's person. The State also presented evidence that the package contained eighty-five grams of the white, rocklike substance, an amount consistent with the dealing of drugs. The State further presented evidence that Laracuente was attempting to hide the contents from the police.

The jury could reasonably have inferred from the evidence that Hernandez knew of the contents of the package and that, in an attempt to prevent the police officers from discovering the package, Hernandez gave the package to Laracuente.

IV.

Hernandez contends that the trial court erred in admitting Officer Ryback's testimony or any evidence pertaining to what happened after the dog sniff. Hernandez argues that he should have been free to leave since Officer Ryback's "reason for detention was completed." Appellant's Brief at 22.

The admission of evidence is within the sound discretion of the trial court, and a decision whether to admit evidence will not be reversed absent a showing of manifest abuse of discretion by the trial court resulting in the denial of a fair trial. *Johnson v. State*, 831 N.E.2d 163, 168-69 (Ind. Ct. App. 2005), *trans. denied*. For a decision to be

an abuse of discretion, it must be clearly against the logic and effect of the facts and circumstances before the trial court. *Id*. at 169.

The State contends that the tape-recording of the stop, entered into evidence as Exhibit 2, establishes that the traffic stop was still in progress when the dog sniff occurred. A canine sniff of the perimeter of a vehicle is permitted during an ongoing traffic stop. *Myers v. State*, 839 N.E.2d 1146, 1149 (Ind. 2005). As our supreme court noted in *Myers*:

> The use of narcotics sniffing dogs by police has recently been addressed by the United States Supreme Court. Deciding "[w]hether the Fourth Amendment requires a reasonable, articulable suspicion to justify using a drug-detention dog to sniff a vehicle during a legitimate traffic stop," the Court declared that the use of a narcotics-detection dog "generally does not implicate legitimate privacy interests." *Illinois v. Caballes*, 543 U.S. 405, 125 S.Ct. 834, 837, 838, 160 L.Ed.2d 842, 846-47 (2005). It reasoned that "[o]fficial conduct that does not compromise any legitimate interest in privacy is not a search subject to the fourth Amendment," that "government conduct that only reveals the possession of contraband compromises no legitimate privacy interests," and that "the expectation that certain facts will not come to the attention of the authorities is not the same as an interest in privacy that society is prepared to consider reasonable." *Caballes*, 125 S.Ct. at 837-38, 160 L.Ed.2d at 847 (included quotations omitted). The Court held that "conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner ...." *Caballes*, 125 S.Ct. at 837-38, 160 L.Ed.2d at 848. The Court did note, however, that a "seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it if prolonged beyond the time reasonably required to complete that mission." *Caballes*, 125 S.Ct. at 837, 160 L.Ed.2d at 846.
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> The defendant does not contend that the canine sniff prolonged his own detention by the police. Rather, his claim

> is that, once the stop was complete, his Fourth Amendment rights were violated by the police thereafter conducting the canine sweep of his vehicle. This claim fails for two independent reasons. First, as explained in *Caballe*s, a canine sweep of the exterior of a vehicle does not intrude upon a Fourth Amendment privacy interest. Second, the trial court properly determined that the canine sweep was conducted before the traffic stop was completed.

Id. Our review of Exhibit 2 reveals that the canine sweep began just minutes after the initial stop, and at that time Officer Ryback had radioed in and was waiting for information about Hernandez's prior conviction for driving without insurance. The sweep was permissible as it occurred before the traffic stop was completed. Accordingly, the trial court did not abuse its discretion in admitting the evidence that was procured after the sweep.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.